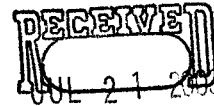




UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

JUL 17 2003



Mr. Richard Cano
Acting Director
Seafood Inspection Program
NMFS/NOAA/USDC
1315 East-West Highway
Silver Spring MD 20910-3282

Dear Mr. Cano:

This letter responds to your June 3, 2003, appeal of the National Oceanic and Atmospheric Administration (NOAA) decision to list as commercial activities the non-managerial inspection functions performed on behalf of the United States Department of Commerce (DOC), National Marine Fisheries Service (NMFS), Seafood Inspection Program (SIP), under the Federal Activities Inventory Reform Act of 1998 (FAIR), P. L. 105-270.

NOAA's decision is set forth in the May 20, 2003, Challenge Decision Letter of NOAA's Acting Chief Financial Officer, which denied your challenge to the third release of the FY 2002 FAIR Inventory. NOAA based its denial on the facts that (1) SIP inspectors did not fit within the statutory definition of exempted NAFI employees, and (2) while some SIP functions may be inherently governmental, others (such as those involving purely technical or scientific tasks) "could be specified in the terms of a contract." Challenge Decision Letter, p.2.

Your Appeal rests on two independent arguments: First, SIP should be excepted from FAIR under FAIR's exception for Non-Appropriated Fund Instrumentalities (NAFI's). Second, the services SIP performs fall within the FAIR Act's definition of "inherently governmental function[s]" that must not be designated commercial.

As discussed below, I conclude that SIP inspectors' activities meet the statutory standard for "inherently governmental functions" based upon the official Position Descriptions of the SIP inspectors; the relevant DOC regulations; the practice and interagency agreements of other, related Federal agencies; and unrebutted, reliable reports that the commercialization of SIP would have an impact adverse to United States' interests. Inspectors' functions are integral to SIP's overriding mission, which is to promote and protect public health and safety and economy. I therefore reverse the decision of the Acting Chief Financial Officer and sustain your Appeal.¹

¹ Since my finding of the inherently governmental function of SIP inspectors fully resolves this Appeal, I do not reach the question whether SIP is excepted from FAIR because it is a NAFI, or because it does not operate on appropriated funds. I note, however, that it is difficult or impossible for private contractors to successfully

The FAIR Act Standard:

FAIR Sections 5(A) and (B) define the inherently government functions that are not to be included on an agency's commercial inventory:

(A) DEFINITION.—The term “inherently governmental function” means a function that is so intimately related to a public interest so as to require performance by Federal Government employees.

(B) Functions included.—The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—

* * * *

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise.

These provisions demonstrate that “interpretation and execution of the laws of the United States so as to...protect, and advance United States economic...property, or other interests” is fundamental to an “inherently governmental function.”

Discussion

The NOAA position descriptions [“PD’s”] used to recruit inspectors describe the functions performed by SIP inspectors. These PD’s explicate inspectors’ duty to perform functions encompassed in the FAIR standard quoted above, *i.e.*, to “interpretation and execution of the laws of the United States” for the “protect[ion] and advance[ment]” of United States’ interests.

For example, the PD’s for Consumer Safety Inspector and Consumer Safety Officer require a “[t]horough knowledge of statutes, regulations, standards, and NMFS instructions and policies....” *See* GS-0696-11, Factor 1—Knowledge Required (1994); *cf.* GS-9, Knowledge Required. The PD identifies “Federal, state, and other-agency regulations, grading standards, specifications, NMFS instructions....” *Id.*, Factor 3—Guidelines, *cf.* GS-9, Guidelines. The

compete on a cost basis with NAFI’s. *See, e.g., Sodexo Management, Inc.*, B-289605, July 5, 2002, 2002 CPD 95 [HELD: A contracting agency’s failure to provide advance notice that NAFI employees constitute more than 80% of the labor force in competed program deprives offerors of information necessary to making intelligent business judgments concerning whether, and how, to compete]. NOAA’s Challenge Decision Letter also reflects the fact that outsourcing SIP functions might be impractical if SIP—like many NAFI’s—is already operating at maximum cost-efficiency. *Id.*, p.2.

inspector not only must *know* these rules, but also must “interpret, adapt, and apply these guidelines to novel plant and product situations.” *Id.*

Further, the PD’s repeatedly demonstrate that inspectors necessarily “protect and advance” United States economic and public health interests in the performance of their day-to-day duties. FAIR Section 5(2)(B)(ii). For example, the GS-11 Position Description makes clear that the standards applied by inspectors “are critical to public health....” *Id.*, Factor 4 - Complexity. Inspectors’ work affects “the wholesomeness and safety of fish and seafood products, and ultimately, the well being of consumers.... Inspector’s work also affects the economic well being of plant/establishment owners.” GS-0696-11, Factor 5 - Scope and Effect, *cf.* GS-9, Scope and Effect. SIP employees are tasked with assisting plant managers and owners to develop plans to bring and maintain their plants into compliance with Federal standards; they possess authority and discretion to “approve[]/disapprove[] client proposals to remedy unsanitary conditions or non-conforming products.” *See* GS-0696, Part II: Major Duties and Responsibilities, *Cf.* GS-9, Duties [“They are expected to analyze (health hazard) problems or conditions and develop recommendations for their solution.”]. *Compare* 50 CFR Ch. I Section 260.86, Approved identification [Inspectors certify that the products are wholesome and sanitary and that the products meet the requirements for grade, quality and are placed in the proper classification].

The DOC Regulation concerning Inspection and Certification, 50 CFR Ch. 11, underscores the inherently government nature of SIP’s mission. It mandates that inspection functions will normally be performed *only* by government employees—Federal employees or, in exceptional cases and with prior certification by the Secretary of Commerce,² State employees:

Sec. 260.49, **Inspectors**, Inspections will ordinarily be performed by employees under the Secretary who are Federal Government employees for that purpose. However, any person employed under any joint Federal-State inspection service arrangement may be licensed, if otherwise qualified, by the Secretary to make inspections as may be specified in his license.

Despite amendment of some DOC inspection regulations after enactment of FAIR in 1998, this provision has remained unaltered, and nothing in any other statute or regulation contradicts or supersedes this government-employment requirement.

Yet more evidence that SIP functions qualify as “inherently governmental” is that other agencies that perform similar or related food inspection functions, the United States Department of Agriculture and the Department of Health and Human Services, Food and Drug Administration (FDA), have officially designated those functions as “inherently Governmental” for purposes of FAIR. Also, an October 1974 Memorandum of Understanding (MOU) between FDA and NMFS provides that the two agencies will work

² Before a person employed under a joint Federal-State inspection service arrangement can be certified, the Secretary must be satisfied the person is qualified to perform adequately the inspection services for which the person is licensed. By regulation, each license shall bear the printed signature of the Secretary and shall be countersigned by an authorized employee of the Commerce Department. *Id.* The Department of Agriculture has an identical regulation. *See*, 7 CFR Section 52.31.

Mr. Richard Cano

Page 4

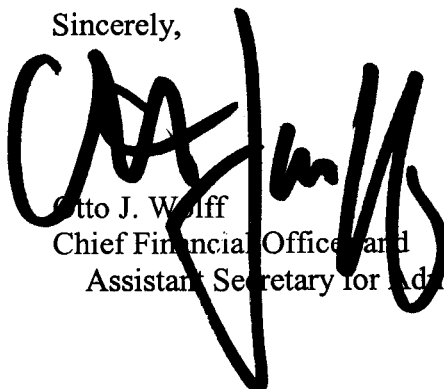
together in conducting seafood inspection with the understanding that DOC's inspections, while not supplanting FDA inspections, should nonetheless reduce the incidence of FDA inspections. This MOU confirms both agencies' recognition that SIP inspections will reduce the need for FDA inspectors to perform their "inherently governmental" inspection functions.

Finally, overarching inspectors' duties of interpreting and enforcing the law is the popular, modern understanding that maintenance of public confidence in American seafood products is a governmental rather than a private function. The performance of these functions by private contractors—even under supervision by government employees—could well result in SIP's failure to continue operating effectively in building public confidence in seafood safety.

In this connection, I note that there is some evidence that foreign importers of United States fish products so heavily depend on U.S. Government certification of seafood products that these importers effectively require that inspection functions be performed by Government personnel. For example, Canada, China and the countries comprising the European Union either require or have expressed an intent to require US Government certification on seafood products imported from the United States. Transfer of these functions to private organizations would have a definite, though difficult to measure, adverse impact on seafood exports and the American economy. It is reasonable to conclude that SIP inspection functions cannot be performed by private entities as effectively as they are currently performed by Government employees.

For these reasons, I have decided that SIP inspector functions qualify as "inherently governmental" within the meaning of FAIR Section 5(2)(B), and therefore sustain your Appeal.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'O. Wolff'.

Otto J. Wolff
Chief Financial Officer and
Assistant Secretary for Administration

cc: Undersecretary for Oceans and Atmosphere
General Counsel